MOTION FILED
NOV - 6 1997.

(3)

No. 97-605

In the
Supreme Court of the United States
October Term, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION AND BRIEF OF AMICUS CURIAE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

Eric J. Magnuson
Counsel of Record
Richard J. Nygaard
Daniel Q. Poretti
RIDER, BENNETT, EGAN
& ARUNDEL, LLP
2000 Metropolitan Centre
333 South Seventh Street
Minneapolis, Minnesota 55402
(612) 340-7951

Attorneys for Amicus Curiae BFI Waste Systems of North America, Inc

1997 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

33 pp

No. 97-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

MOTION OF BFI WASTE SYSTEMS OF NORTH AMERICA, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Movant BFI Waste Systems of North America, Inc. ("BFI") hereby seeks leave to file a brief *amicus curiae* in support of the Petition of Ben Oehrleins and Sons and Daughter, Inc, et al., and Robinson Rubber Products Co., Inc.,

et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.[1]

BFI is one of the nation's largest publicly-held companies which collects, processes for recycling, transports, and disposes of a wide range of commercial, industrial, medical, and residential solid wastes. BFI is subject to solid waste "flow control" programs and requirements, including provisions and mandates that were developed subsequent to and despite this Court's holding in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994).

BFI operates a landfill in Dakota County, Minnesota. It has historically utilized that facility, or others located within Minnesota, for the disposal of wastes generated within neighboring Hennepin County. The "as enforced" Ordinance 12 precludes the Company from utilizing alternative in-state disposal facilities. BFI has filed a separate lawsuit similar to the case at bar, seeking the recovery of damages from Hennepin County. Additionally, BFI was granted leave by the Eighth Circuit to participate as an *amicus* on the petition for rehearing below.

BFI's interest in this case is, however, far broader than the specific dispute between the parties. BFI and similarly situated businesses experience, on a national scale, the impact of governmental action like that taken by Hennepin County in this case. With all due respect to the parties to this case, BFI

---

[1]Petitioners have consented in writing to this *amicus* brief. Counsel for Respondent Hennepin County has informed undersigned counsel of record that he does not consent to the filing of the *amicus* brief.

believes that its broad, national experience, and the perspective it has gained from that experience, will allow it to be of significant additional assistance to the Court in its consideration of the important national issues raised by the petition.

Respectfully submitted,
Eric J. Magnuson
(Counsel of Record)
Richard J. Nygaard
Daniel Q. Poretti
Rider, Bennett, Egan & Arundel
2000 Metropolitan Centre
Minneapolis, MN 55402
(612) 340-7951

November 4, 1997

Attorneys for Movant
BFI Waste Systems of North America, Inc.

No. 97-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BEN OEHRLEINS AND SONS AND DAUGHTER, INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

ROBINSON RUBBER PRODUCTS CO., INC., *et al.*,
Petitioners,

v.

HENNEPIN COUNTY, MINNESOTA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* BFI WASTE SYSTEMS OF NORTH AMERICA, INC. IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

Amicus BFI Waste Systems of North America, Inc. believes that certiorari should be granted on the following questions, which are fairly encompassed by the Petition's third and fourth questions presented:

1. May local governments avoid this Court's holding in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) by merely "suspending" an ordinance that clearly violates the commerce clause, where the effect of the continued existence of the invalid ordinance has a significant negative effect on commerce?

2. May local governments avoid this Court's holding in Carbone by prohibiting the transport of waste to in-state, but not out-of-state, waste processing facilities that would compete with a preferred local facility, where the effect is significant discrimination against interstate commerce?

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED iv

INTEREST OF *AMICUS* 1

REASONS FOR GRANTING THE WRIT 1

I. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES. 2

A. The "As Enforced Bifurcated" Ordinance Is Merely One Example of Numerous Actions Undertaken Subsequent to this Court's Holding in Carbone That Have Balkanized the Movement of Waste and Disrupted Important Regional Markets for Solid Waste Management Services 4

B. Flow Control Requirements Have Significant Consequences, Both Economic and Environmental 7

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE. . . . 11

A. The Eighth Circuit Erred in its Conclusion That the "As Enforced Bifurcated" Hennepin County Ordinance 12 Was Not Subject to the "Virtually per Se Rule of Invalidity". . . 11

B. The Court below Erred in its Precipitous Finding That the Pike Balancing Test Was Applicable Despite Record Evidence of Protectionist Intent or Motivation in the Creation and Implementation of the "As Enforced Bifurcated" Ordinance. 18

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Cases:

Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3rd Cir. 1995) 8

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986) 18

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994) ... 1, 2, 4-8, 10, 11, 13, 15, 16, 20

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S.Ct. 1590 (1997) 14, 15

Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992) 13

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 12

Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995) 6

Container Corp. of Carolina v. Mecklenburg County No. 3:92 CV-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) 8

Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951) 11

Environmental Waste Reductions, Inc. v. Georgia Dep't of Natural Resources,
C.A. No. 1:94-CV-1498-FMH (Nov. 30, 1994) 13

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources,
504 U.S. 353 (1992) 11, 13

H.P. Hood & Sons v. DuMond,
336 U.S. 525 (1949) 14

Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 15

Heier's Trucking, Inc. v. Waupaca County,
____ N.W.2d ____,
1997 WL 429011 (Wis. Ct. App. 1997) 16

Hughes v. Oklahoma,
441 U.S. 322 (1979) 14, 18

Hunt v. Washington State Apple Advertising Comm'n,
432 U.S. 333 (1977) 18

J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl Protection,
857 F.2d 913 (3d Cir. 1988) 8

Katzenbach v. McClung,
379 U.S. 294 (1964) 15

Mid-American Waste Sys., Inc. v. Fisher,
No. C-2-94-493, slip op.
(S.D. Ohio May 31, 1994) 6, 13

Oregon Waste Systems, Inc. v. Department
of Envtl. Quality,
511 U.S. 93 (1994) 13

Philadelphia v. New Jersey,
437 U.S. 617 (1978) 13, 14, 18

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 11

Quincy College & Seminary Corp. v. Burlington N., Inc.,
328 F. Supp. 808 (N.D. Ill. 1971) 13

Sanifill, Inc. v. Kandiyohi County, Minn.,
No. C4-95-1363, slip op.
(Kandiyohi County 8th Jud. Dist. Feb. 8, 1996) 6

SDDS, Inc. v. South Dakota,
47 F.3d 263 (8th Cir. 1995) 18

Southcentral Pa. Waste Haulers Ass'n v.
Bedford-Fulton-Huntingdon Solid Waste Auth.,
877 F. Supp. 935 (M.D. Pa. 1994) 13

SSC Corp. v. Town of Smithtown,
66 F.3d 502 (2d Cir. 1995) 5, 16

Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Sys., Inc., 632 A.2d 134 (Me. 1993) 13

United States v. Bell, 90 F.3d 318 (8th Cir. 1996) 15

United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996) 15

United States v. Jensen, 69 F.3d 906 (8th Cir. 1995) 15

United States v. Lerebours, 87 F.3d 582 (1st Cir. 1996) 15

United States v. Lopez, 514 U.S. 549 (1995) 14, 15

United States v. McMasters, 90 F.3d 1394 (8th Cir. 1996) 15

United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996) 15

United States v. Tisor, 96 F.3d 370 (9th Cir. 1996) 15

United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) 15

USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995) 5

Waste Sys. Corp. v. County of Martin,
985 F.2d 1381 (8th Cir. 1993) 8, 18

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 6

Wickard v. Filburn,
317 U.S. 111 (1942) 13

Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.,
558 N.W.2d 288 (Minn. Ct. App. 1997) 6

Other Authorities:

56 Fed. Reg. 50,978, 50,989 (1991) 10

Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce,
102d Cong., 1st Sess. 80 (1991) 12

John H. Turner, *The Flow Control of Solid Waste and the Commerce Clause: Carbone And Its Progeny*,
7 Vill. Envtl. L.J. 203 (1996) 4

Jonathan H. Adler, *The Failure of Flow Control*,
18 Regulation, No. 2, 11 (1995) 9

National Economic Research Associates,
The Cost of Flow Control,
May 3, 1995 8

National Solid Wastes Management Association,
The Effects of Designation and District Fees on Solid Waste Management in Ohio (1993) 10

INTEREST OF *AMICUS*

The interest of *amicus* BFI Waste Systems of North America, Inc. is set forth in the accompanying motion for leave to file this brief.[1]

REASONS FOR GRANTING THE WRIT

Since this Court's decision in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994), local governments have repeatedly attempted to circumvent the Court's ruling by requiring solid waste haulers to sign contracts obligating them to dispose of collected wastes at designated facilities, as an alternative to denial of a necessary license or permit to operate. Similarly, some jurisdictions have mandated that waste haulers abide by "economic flow control" programs, as described below, on the basis that such regimes are beyond the scope of the Carbone holding.

This case presents yet another effort to avoid the clear implications of the Court's decision in Carbone. The "as enforced bifurcated" Hennepin County Ordinance 12 essentially mandates that waste haulers that do not utilize an out-of-state disposal facility are required to deliver materials to the designated County site. BFI is directly and adversely affected by the Ordinance, as enforced. Other jurisdictions, within and outside of Minnesota, have taken the same approach, or have formally modified their local ordinances to preclude the intrastate movement of waste. Such requirements prevent the

---

[1]This brief has been authored entirely by counsel for *amicus* BFI, and no other person or entity has made any monetary contribution to its preparation or submission.

efficient and environmentally protective disposal of solid waste, and contravene the Commerce Clause and this Court's decisions.

I. THIS CASE PRESENTS AN ISSUE OF CONSIDERABLE IMPORTANCE GIVEN THE THREAT TO THE NATIONAL ECONOMY PRESENTED BY LOCAL FLOW CONTROL MEASURES.

Hennepin County, like other political subdivisions in every state, depends upon open borders and a national economy that both provides benefits and imposes burdens. The Commerce Clause serves to ensure that those borders remain open, and that they not be closed as to some commodities, while open for others. Hennepin County has, obviously, made no effort to preclude the importation of seemingly desirable foodstuffs, manufactured goods, service equipment, etc., or the export of other locally-produced goods for sale elsewhere, but for economic reasons seeks to prohibit the export of a single commodity--waste.

The post-Carbone efforts to retain existing and impose new flow control mandates and programs despite this Court's ruling are reminiscent of other regrettable episodes in our Nation's history. The authority and duty of this Court to intervene are clear. In the absence of the Court's intercession, political subdivisions of states will engage in an unnecessary and counterproductive war of retaliation--as jurisdictions whose economies are disadvantaged due to the loss of imported waste volumes act in kind by precluding the export of their wastes. Real safety and health threats will result from continued reliance upon older, often substandard disposal sites. The goals of the

Congress in enacting RCRA and of the EPA in promulgating the Subtitle D rules will be ill-served.

Just as prohibitions on the movement of waste across state lines adversely affect the national economy, by isolating local jurisdictions from the burdens, though not the benefits, inherent in a single Union, so too do restrictions on the movement of waste between political subdivisions of a single state balkanize the marketplace. They affect--indeed, substantially so---the national marketplace by artificially distinguishing between "waste" materials and the open borders that facilitated the transportation, importation, purchase, and consumption of the "original" materials. They deprive companies such as BFI, as well as governments who construct or expand state-of-the-art facilities, of the ability to make meaningful long-term investments in disposal capacity and transportation vehicles. They disrupt regional intergovernmental efforts to improve the efficiency and environmental protectiveness of waste disposal. They artificially and dramatically increase the costs of solid waste management. And, perhaps most importantly, they constitute deliberate efforts to circumvent the goals of the Commerce Clause and this Court's numerous opinions. Review by this Court is necessary to ensure that the Commerce Clause's vital role in protecting a truly national economy is not diminished.

A. The "As Enforced Bifurcated" Ordinance Is Merely One Example of Numerous Actions Undertaken Subsequent to this Court's Holding in Carbone That Have Balkanized the Movement of Waste and Disrupted Important Regional Markets for Solid Waste Management Services

In Carbone this Court held that a flow control ordinance adopted by Clarkstown, New York, violated the Commerce Clause. By suspending "until further notice" enforcement of Ordinance 12 with regard to wastes transported to out-of-state disposal facilities, Hennepin County sought to ensure that the majority of wastes generated within the County would remain there, notwithstanding Carbone. In so doing, the County apparently concluded, and the Eighth Circuit apparently agreed, that this Court's ruling was limited to instances in which the waste hauler delivers collected materials directly to an out-of-state facility.

Unfortunately, Hennepin County's attempt to interpret Carbone in a narrow fashion to justify the retention of its flow control mandates is far from an isolated case. Whether by "as enforced" or truly "bifurcated" flow control ordinances that prohibit the delivery of waste to alternative in-state facilities, or by *de facto* flow control schemes such as so-called "market participant" franchise requirements that are essentially regulatory licensing programs, or by "economic flow control" programs that create no "legal" obligation to use a preferred facility, yet impose an economic disincentive to go elsewhere, a number of local governments have sought to undermine the Carbone holding through new or modified flow control requirements. John H. Turner, *The Flow Control of Solid Waste*

and the Commerce Clause: Carbone And Its Progeny, 7 Vill. Envtl. L.J. 203 (1996).

The decision below--by mandating that such ordinances be subject to a traditionally less-intrusive test under the Commerce Clause--will unquestionably encourage the enactment of similar provisions in other jurisdictions. The petition in this case provides an opportunity for this Court to forcefully pronounce that it meant what it said in Carbone: flow control measures violate the Commerce Clause. These measures have taken several forms.

One such form is the "franchise ordinance". Several jurisdictions outside the Second Circuit have contended that this Court's denials of certiorari in SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995), cert. denied, 116 S.Ct. 911 (1996), and in USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272 (2d Cir. 1995), cert. denied, 116 S.Ct. 1419 (1996), immunize from Commerce Clause scrutiny franchise ordinances whose waste delivery provisions are essentially nonnegotiable, when the resulting process is virtually identical to flow control mandates created by the type of ordinance examined in Carbone. Unlike some franchise arrangements, in which the award is either for collection only and the hauler may choose the collection site, or combined collection/disposal franchises in which the hauler and community may negotiate which disposal site(s) is utilized, in these programs the franchisee has "no choice", and must indeed utilize a particular facility as a condition of the franchise.

Likewise, some local governments have sought to condition their programs by requiring that a waste hauler indicate in the franchise application its "plan for disposal" or otherwise state that it will utilize a preferred disposal facility. Various municipal

contracts for collection or recycling have included flow control provisions in instances in which no reasonable opportunity for negotiation exists, such that the hauler has no alternative but to reject outright the contract and be deprived of the "privilege" of servicing the community. In such cases, the Commerce Clause has been violated.

Similarly, "economic flow control" programs involve local governments that seek to achieve the same result as the ordinance invalidated in Carbone by reducing the "tip fee" at the "preferred" facility while making up the difference through some form of tax or fee. Such measures do not seek overtly to compel waste haulers to utilize a preferred facility; instead, they place significant economic pressure upon the haulers to do so. As several courts have recognized, economic flow control is simply ordinance flow control by another name. Both result in the same interference with protected commerce. Recent decisions in several lower courts have either strongly suggested or expressly held that certain "economic flow control" measures (for example, when the community lowers the tip fee at the public landfill and institutes a "generator fee", user fee, or revenue assessment/tax to make up for the potential revenue loss) are unconstitutional.[2]

"Economic flow control" schemes need not always result in a situation in which the former tip fee at a preferred or designated

---

[2]See, e.g., West Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994); Mid-American Waste Sys., Inc. v. Fisher, No. C-2-94-493, slip op. (S.D. Ohio May 31, 1994); Connecticut Carting Co. v. Town of East Lyme, 946 F. Supp. 152 (D. Conn. 1995); Sanifill, Inc. v. Kandiyohi County, Minn., No. C4-95-1363, slip op. (Kandiyohi County 8th Jud. Dist. Feb. 8, 1996), aff'd, 559 N.W.2d 111 (Minn. Ct. App. 1997); Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist., 558 N.W.2d 288 (Minn. Ct. App. 1997), rev. granted, March 26, 1997.

facility is replaced, cent for cent, with a combination fee or tax and a reduced tip fee. But there is typically some economic incentive that is used that avoids true competition in the marketplace, and which acts to essentially "force" waste haulers to use a particular facility. Similarly, the type of "bifurcated" ordinance enforced by Hennepin County is an obvious effort to retain within a flow control system locally-generated wastes. In instances in which the local jurisdiction is not within "striking distance" of a state border, such ordinances often have their intended effect. Yet, as this Court is well aware, flow control measures, whether directly imposed as in Carbone or as implemented "through the back door", have serious, adverse consequences.

B. Flow Control Requirements Have Significant Consequences, Both Economic and Environmental

A recent study conducted by the National Economic Research Associates ("NERA") summarized the historical development of flow control mandates:

> Although flow controls have been imposed for over 20 years, they have only recently become a serious concern as the variety and accessability of alternatives has increased. The private sector responded to rapidly rising disposal costs in the mid-1980s to the early 1990s by building more disposal capacity. While the number of landfills in the U.S. has dropped rather dramatically, landfill capacity has not. In fact, capacity has been increasing in many regions of the country. As a result, disposal charges are no longer increasing, but rather falling as disposal facilities compete for business. In addition, the disparity has been exacerbated by local

> governments relying on flow control to finance recycling and other waste management programs. Local governments have imposed fees and surcharges at flow control facilities. Third, some governments became more aggressive regarding flow control as waste streams diminished at least in part because of government regulations and programs. Paper recycling, for example, has eliminated an important fuel stock from resource recovery plants.[3]

Flow control requirements add "approximately $10 per ton or 33 percent to the average landfill disposal charge (tip fee) nationwide", "$11.50 per ton or 23 percent to the average incinerator disposal charge (tip fee) nationwide", and "approximately $14 per ton or 33 percent to the average transfer station disposal charge (tip fee) nationwide."[4]

Moreover, there is no demonstrated correlation between flow control and environmentally protective waste disposal, recycling, or processing. To the contrary,

---

[3]National Economic Research Associates, *The Cost of Flow Control*, May 3, 1995, at 5.

[4]Id. at 1-2. In addition, several of the pre- and post-Carbone decisions have noted the significant and artificial economic dislocations created by flow control mandates. See, e.g., Waste Sys. Corp. v. County of Martin, 985 F.2d 1381, 1387 (8th Cir. 1993) ($72 per ton disposal fee at designated facility; $30 at nearby facility); J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl Protection, 857 F.2d 913, 916 (3d Cir. 1988) (flow control resulted in $100 per ton disposal charge, as opposed to rates "approximately half" at accessible facilities), overruled by Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders, 48 F.3d 701 (3rd Cir. 1995); Container Corp. of Carolina v. Mecklenburg County, No. 3:92 CV-154-MU, 1995 WL 360185 (W.D.N.C. June 22, 1992) ($37.50 per ton/$29.50 per ton).

> . . . by mandating that local waste haulers use particular management facilities, the haulers are prevented from using more environmentally sound alternatives that may exist elsewhere. The Sierra Club and other environmental groups have rightly pointed out that such regulations often inhibit the development of alternative waste management options and, in some cases, disrupt preexisting waste recovery and recycling efforts. Flow control laws unnecessarily inhibit the ability of recyclers and other ecological entrepreneurs to compete in the marketplace and provide more economical waste management options. For that reason, and because flow control has frequently been used to finance costly and inefficient incinerators, flow control is opposed by the New York Public Interest Research Group, the National Resources Defense Council, the National Wildlife Federation, Clean Water Action, and Greenpeace, among others. Those groups maintain that in practice it is likely that the environmental costs of flow control outweigh its benefits.[5]

These significant economic and environmental arguments against flow control measures are clearly applicable to most flow control programs--regardless of the method by which they were created. By selecting as the designated landfill a facility that may not, and all-too-often does not, satisfy best available landfill technology standards, local governments clearly have not sought to promote environmental protection through their flow control mandates. Flow control requirements are typically imposed for economic, not environmental, reasons. And, as the National Solid

---

[5]Jonathan H. Adler, *The Failure of Flow Control*, 18 Regulation, No. 2, at 11, 13 (1995).

Wastes Management Association demonstrated in a report on flow control programs in Ohio, the requirements adopted by the state's political subdivisions have increased costs to generators and transporters of waste without providing any environmental benefit. National Solid Wastes Management Association, *The Effects of Designation and District Fees on Solid Waste Management in Ohio*, at 4, 5 (1993). The report noted that the selection of certain landfills as "designated" flow controlled facilities means that many tons of wastes are disposed of at less than state-of-the-art facilities. Moreover, the creation of county/district flow control programs in Ohio has significantly reduced inter-county and inter-district waste movements, resulting in a balkanization of the marketplace. Id.

Flow control requirements are illegal, wasteful, and counterproductive. Yet they continue despite this Court's unambiguous ruling in Carbone. The "as enforced" Hennepin County ordinance is far from isolated--it is typical of post-Carbone efforts to restrict the movement of waste. Such programs and actions balkanize waste movements. They preclude the development of regional disposal solutions, in spite of the U.S. Environmental Protection Agency's view that multi-governmental regional sites are cost-effective and more likely to be managed in an environmentally protective manner.[6] The decision below

---

[6]56 Fed. Reg. 50,978, 50,989 (1991) (in issuing the Resource Conservation and Recovery Act ("RCRA") "Subtitle D" regulations applicable to municipal solid waste landfills, 40 C.F.R. Part 258, the Agency emphasized that "small landfills tend to be poorly located and designed, and operate at the high end of the cost per ton scale. As a result, small communities have a number of strong incentives to regionalize and, in fact, many of them have moved or are currently moving to regional facilities.") These regulations apply to all facilities that accept waste derived from households, regardless of the geographic areas served by the landfill.

threatens the national marketplace in solid waste management by endorsing in-state balkanizations that cannot be squared with the goals of a national economic unit, and with the particular need for the efficient, environmentally protective disposal of solid waste. The petition provides an opportunity for this Court to declare that it meant what it said in Carbone--flow control measures violate the Commerce Clause.

II. THE DECISION BELOW IS A CLEAR DEPARTURE FROM THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE.

A. The Eighth Circuit Erred in its Conclusion That the "As Enforced Bifurcated" Hennepin County Ordinance 12 Was Not Subject to the "Virtually per Se Rule of Invalidity".

The Eighth Circuit's opinion instructed the district court to apply the "Pike" balancing test (Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)) rather than the "per se" test employed in Carbone. Yet this Court has made clear that import/export restrictions imposed by political subdivisions within a state that restrict the movement of waste to and from other areas within the same state are just as violative of the Commerce Clause as are "state border" restrictions. In Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. 353, 361 (1992), this Court noted that "a State (*or one of its political subdivisions*) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce *through subdivisions of the State*, rather than through the State itself." (Emphasis added.) Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951), stands for the same proposition.

The U.S. generates a minimum of 180 million tons of solid waste each year. See, e.g., *Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 80 (1991) (statement of Don R. Clay, then Assistant Administrator for Solid Waste and Emergency Response, Environmental Protection Agency). Indeed, current estimates are closer to 200 million tons. While a significant amount--at least 15 million tons, or 8 percent--moves in commerce between states in a well-established national marketplace, substantially larger volumes are shipped between political subdivisions of the same state. Regional wastesheds exist, both within and outside of states. Moreover, it has become increasingly difficult to site and permit new disposal facilities. Accordingly, it is of considerable importance to the national economy that states and localities not seek to isolate themselves from the national and intrastate/regional markets in solid waste transportation and disposal.

Flow control and export restriction requirements disrupt those markets by "hoarding" wastes, making it difficult for operators to justify the continuation of disposal activities at costly state-of-the-art landfills. This Court has specifically rejected "any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981), reh'g denied, 453 U.S. 927 (1981).

Likewise, in several recent decisions, courts have enjoined, invalidated, or subjected to the "per se" invalidity test flow control or related measures that affected landfills or waste haulers who

handled purely intrastate, as opposed to interstate, waste shipments.[7]

Although the courts, including the district court in this case, that have invalidated seemingly "intrastate" measures or restrictions on intrastate movement have not utilized a uniform approach, there appear to be three major justifications for their position:

(1) The collection, processing, and disposal of waste is inherently a matter of interstate commerce--a proposition clearly set forth in Philadelphia v. New Jersey, 437 U.S. 617 (1978), Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992), Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992), Oregon Waste Systems, Inc. v. Department of Environmental Quality, 511 U.S. 93 (1994), and Carbone. See also Wickard v. Filburn, 317 U.S. 111 (1942) (the act of growing of wheat "affected" interstate commerce); Quincy College & Seminary Corp. v. Burlington N., Inc., 328 F. Supp. 808, 810 (N.D. Ill. 1971), aff'd, 405 U.S. 906 (1972). In addition, the act of the transportation of waste to a final disposal or processing facility is but one of a number of commercial transactions that have been seamlessly linked in commerce. The original raw materials that end up as "waste" were collected or mined and manufactured into goods that were transported in commerce into Hennepin County and purchased or otherwise utilized there. Moreover, collectors and transporters of waste, as well as operators of disposal and recycling facilities, not only

---

[7]E.g., Mid-American Waste Sys., Inc. v. Fisher, No. C-2-94-493 (S.D. Ohio May 13, 1994); Southcentral Pa. Waste Haulers Ass'n v. Bedford-Fulton-Huntingdon Solid Waste Auth., 877 F. Supp. 935 (M.D. Pa. 1994); Environmental Waste Reductions, Inc. v. Georgia Dep't of Natural Resources, C.A. No. 1:94-CV-1498-FMH (Nov. 30, 1994), Tri-State Rubbish, Inc. v. Town of Gray and Regional Waste Sys., Inc., 632 A.2d 134 (Me. 1993).

participate in these acts of commerce but also routinely purchase supplies and equipment, sell collection and disposal/processing services, and finance new and expanded activities, all in interstate commerce. Accordingly, both solid waste and the parties that engage in its management for commercial reasons are inherently "in" as well as "affect" commerce.

(2) The proliferation of seemingly "local" regulations or taxes could balkanize commerce between states. See H.P. Hood & Sons v. DuMond, 336 U.S. 525, 538-39 (1949); Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979).

(3) The scope of the "dormant" Commerce Clause has consistently been viewed as broadly as the "proactive" Clause, and courts have virtually without exception found many seemingly local activities to be "protected" commerce--i.e., "interstate" commerce. This Court has made clear on several occasions--most recently in Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S.Ct. 1590 (1997), that the scope of commerce protected by the "dormant" Commerce Clause is as broad as the "congressional" aspect of the Clause.[8] A local requirement that commodities not be exported (or imported) to or from other political subdivisions of the same state is incompatible with the scope of Federal regulation of numerous seemingly "in-state" parties and activities.

This Court's opinion in United States v. Lopez, 514 U.S. 549 (1995), has not altered the time-honored principle that even a

---

[8]See also Hughes v. Oklahoma, 441 U.S. 322, 326 n.2 (1979) ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation"); Philadelphia v. New Jersey, 437 U.S. at 622 (declaring the absence of a "two-tiered" approach to the definition of "commerce").

purportedly "local" restriction that is expressly directed only at other activity within a state may "affect" interstate commerce and therefore be subject to Commerce Clause scrutiny. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).[9]

Moreover, the district court's opinion, and this Court's decision in Carbone, provide a fourth justification for a finding that the "as enforced" Ordinance 12 violates the Commerce Clause: the County operates to exclude all but the favored operator from the business of conducting a waste management disposal or incineration service

---

[9]Numerous courts have, subsequent to this Court's opinion in United States v. Lopez, affirmed the breadth of the commerce power. Examples include United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), aff'g 892 F. Supp. 1327 (D. Kan. 1995) (constitutionality of the Child Support Recovery Act); United States v. Lerebours, 87 F.3d 582 (1st Cir. 1996) (prohibitions on drug trafficking); United States v. Tisor, 96 F.3d 370 (9th Cir. 1996) (distribution of controlled substances); United States v. Tucker, 90 F.3d 1135 (6th Cir. 1996) (carjacking).

Indeed, the Eight Circuit has issued several opinions that conflict with its reasoning in this case. In United States v. Jensen, 69 F.3d 906 (8th Cir. 1995), the court held that 18 U.S.C. Section 1956(a), which addresses money laundering, was within Commerce Clause authority despite the fact that the activity did not involve a transaction across state lines, because the seemingly localized activities influenced or affected interstate commerce. Likewise, in United States v. Bell, 90 F.3d 318 (8th Cir. 1996), the court sustained 21 U.S.C. Section 841(a)(1), which imposes a nationwide prohibition on drug trafficking, although the defendant did not traverse a state line. In United States v. Monteleone, 77 F.3d 1086 (8th Cir. 1996), a statute that prohibits the distribution of firearms to convicted felons was upheld. Indeed, in United States v. McMasters, 90 F.3d 1394 (8th Cir. 1996), the court, in sustaining a Federal law regarding arson, reasoned that Lopez imposes no more than a requirement that the local activity have a "de minimis" effect on interstate commerce. These rulings strongly suggest that the Eighth Circuit ignored this Court's holding in Camps Newfound/Owatonna.

within the County for the receipt of locally generated waste, thus depriving other in-state and out-of-state businesses from access to the marketplace. Carbone, supra, at 389. The Eighth Circuit incorrectly contended that Ordinance 12, as enforced, tolerates the participation of out-of-state processors, who may receive wastes delivered to their distant facilities. Yet no other provider of waste management services may, after constructing a facility within Hennepin County, hope to receive any County-generated waste. Such restrictions on direct access to markets contravene the Commerce Clause. See SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2d Cir. 1995); Heier's Trucking, Inc. v. Waupaca County, ____ N.W.2d ____, 1997 WL 429011 (Wis. Ct. App. 1997).

Hennepin County, and jurisdictions like it, would ostensibly not attempt to argue that EPA national regulations governing solid waste landfills do not apply to facilities that, due to flow control requirements or otherwise, accept only in-county or in-state generated wastes. Yet the ruling below threatens to create a standard under the "dormant" Commerce Clause that simply would not be tolerated in the case of opposition to a Federally-imposed program.

A Commerce Clause philosophy that recognizes, exclusively for purposes of the "dormant" aspect of the Clause, that flow control requirements imposed by political subdivisions of a state which are not "border" counties are permissible, while those imposed by jurisdictions that are "close" to a state line are not, makes little practical or legal sense. It would mean that the citizens of, for example, Duluth, Minnesota (a border city) could benefit from the Commerce Clause, while inhabitants of St. Cloud, Minnesota (a central Minnesota city) may not. It would foster the establishment or retention of a balkanized solid waste system--one that reluctantly acknowledges the inability to restrict the export of

waste to other states, but that emphatically controls and restrains the movement of wastes between political subdivisions of the state. The aggregate effect of such measures would substantially affect interstate commerce. Like the flow control measures invalidated because they restricted the export of wastes from counties, rather than states, such "bifurcated" ordinances isolate counties from the statewide, regional (intrastate) and national marketplaces in waste disposal. Obviously, if every county or municipality adopted a similar requirement, waste disposal would without question be balkanized. Only a small percentage of generated waste would be managed in a truly national marketplace.

Likewise, the harmful effects upon the national economy that would result from judicially-sanctioned importation bans aimed at competitors within the same state justify this Court's review of the Eighth Circuit's decision. Imagine, for example, the counterproductive impacts if Houston, Texas (headquarters of Compaq), prohibited the importation of personal computers manufactured in Austin (home of Dell and other Computer manufacturers). The city of Austin would undoubtedly institute a similar ban of its own, to protect its local manufacturers. Companies deprived of market access would be harmed economically, as would purchasers of computers. These concerns are what prompted the development of the Commerce Clause, and have led the courts to invalidate a number of state and local measures that threaten to interfere with the national economy.

B. The Court below Erred in its Precipitous Finding That the Pike Balancing Test Was Applicable Despite Record Evidence of Protectionist Intent or Motivation in the Creation and Implementation of the "As Enforced Bifurcated" Ordinance.

A state or local measure that discriminates against protected commerce "either on its face *or in practical effect*" is subject to a strict standard--the discriminatory measure can survive only if it serves a legitimate local purpose and is the least discriminatory alternative to achieve local goals. Hughes v. Oklahoma, 441 U.S. 322 (1979); Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986). Moreover, this Court has also determined that a state or local measure that demonstrates "simple economic *protectionism*" (i.e., protectionist intent) is also subject to a "virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. at 623-24. If discriminatory intent is shown, a litigant may argue that per se scrutiny, and not Pike balancing, is applicable--even if the measure is worded in an "even-handed" fashion. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977). The court below ignored record evidence of protectionist intent and the district court's express holding that the "as enforced bifurcated" ordinance was infected with impermissible motivation by holding that the Pike test should govern.[10]

Hennepin County has, in essence, deliberately created a scheme that tolerates the formal existence of waste exportation to other states but seeks to ensure that waste haulers not, as a

---

[10]The Eighth Circuit paid particular attention to the doctrine in Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993), and SDDS, Inc. v. South Dakota, 47 F.3d 263 (8th Cir. 1995).

practical matter, deliver wastes to any facility other than its own. In engaging in a "temporary" act of enforcement discretion, the County undoubtedly anticipated that the substantial majority of collected waste volumes would remain subject to the flow control system. Moreover, the very nature of the "temporary" suspension, and the County's warning that long-term disposal contracts would not be advisable, clearly evidenced the desire to restrain the interstate movement of waste. The district court ascertained that, going beyond the literal wording of the "bifurcated" ordinance, there was evidence of protectionist intent or sentiment so as to justify invalidation of the measure. By ignoring that evidence, the Eighth Circuit also ignored this Court's precedents.

CONCLUSION

This case presents an extremely important question for the Court's consideration, one which impacts individuals, businesses and governmental bodies throughout the country. Despite this Court's decision in Carbone, local governments have continued their efforts to create protectionist schemes that thwart the free flow of commerce. The extent of those ongoing disputes, the significance of the environmental and economic interests implicated and the need for clear and unequivocal guidance on these issues from this Court all support the grant of certiorari.

Respectfully submitted,

Eric J. Magnuson
(Counsel of Record)
Richard J. Nygaard
Daniel Q. Poretti
Rider, Bennett, Egan & Arundel
2000 Metropolitan Centre
Minneapolis, MN 55402
(612) 340-7951

Attorneys for *Amicus Curiae*
BFI Waste Systems
of North America, Inc.

November 4, 1997